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Supreme Court, U.S.
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No. 93-2005

In The

Supreme Court of the United States

October Term, 1994

JO ANN PLAKAS, Individually and as Administrator of the Estate of KONSTANTINO N. PLAKAS, Deceased,

Petitioner,

v.

JEFFREY DRINKSKI, in both his individual and official capacity, and NEWTON COUNTY, INDIANA, a municipal unit of government,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1) Whether the use of deadly force is reasonable where the officer is responding to a threat of imminent bodily harm or death.

2) Whether the Constitution requires a police officer to exhaust non lethal alternatives as a prerequisite to the use of deadly force.

3) Whether the Constitution requires a police department to supply particular equipment to its officers.

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STATEMENT OF THE CASE

On October 15, 1991 Konstantino Plakas, deceased, armed with a fireplace poker overhead, charged at respondent, Jeff Drinski, a deputy sheriff from Newton County, Indiana. In fear for his life, Jeff Drinski fired one shot which fatally wounded Konstantino Plakas.

Petitioner, Jo Ann Plakas, administrator of the Estate of Konstantino Plakas, filed an action pursuant to 42 U.S.C. Section 1983 against respondents, Jeffrey Drinski

and Newton County, Indiana, alleging an unconstitutional use of deadly force. Respondents, Drinski and Newton County filed motions for summary judgment in the district court.

The United States District Court for the Northern District of Indiana granted summary judgment finding that the undisputed facts in the case established that Plakas threatened Drinski with a weapon intending to inflict physical harm. (Pet. App. B-12, 13) The district court applied this Court's opinions in *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) and *Graham v. Connor*, 430 U.S. 386 (1989) in concluding that the use of deadly force was reasonable. (Pet. App. B-9, 10).

Petitioner appealed the dismissal of her case to the Seventh Circuit Court of Appeals which affirmed, also relying on this Court's opinions in *Tennessee v. Garner* and *Graham v. Connor* taking into account that decisions about force must embody allowance for the fact that police officers are often forced to make split second judgments in circumstances that are tense, uncertain and rapidly evolving. *Graham* 490 U.S. 396-97. (Pet. App. A-13).

The plaintiff's petition for writ of certiorari to this Court followed.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE OPINION OF THE SEVENTH CIRCUIT COURT OF APPEALS IS PREMISED UPON A CAREFUL AND DELIBERATE ANALYSIS OF ALL THE EVIDENCE PRESENTED BELOW.

A considered review of the opinion below reveals that it necessarily was premised upon a detailed analysis of the facts and circumstances leading up to the attack on Deputy Jeff Drinski by plaintiff's decedent, Konstantino Plakas in accord with this Court's opinion in *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). Respondent adopts the facts set forth in the opinion of the Seventh Circuit and supplements facts set forth by petitioner which are neither complete nor correct.

Petitioner's statement of facts before this Court states that Plakas was shot while Drinski was trying to effect his arrest. (Pet. p. 2). The petition further states that Plakas took a step towards Drinski and Drinski fired his gun. (Pet. p. 10). Petitioner omits the critical fact that Plakas was armed with a fireplace poker and attacking Drinski at the time that one shot was fired. This is a case of self defense. (Pet. App. A-7).

On October 15, 1991 Konstantino Plakas (hereinafter Plakas) was involved in a one car accident having driven off the road into a ditch. (Doc. No. 21, King, p. 3).[1]

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[1] In addition to deposition testimony, defendants' motion for summary judgment in the district court was supported with the affidavits and statements of material witnesses given to

Paramedic Glen Cain was a volunteer fireman who arrived on the scene and attempted to treat Plakas. (Cain Dep. p.6-7). Cain wanted to take Plakas to the ambulance so that he could check Plakas over. (Cain Dep. p. 8). Plakas refused medical treatment and refused to go with Cain. (Cain Dep. p.12).

Officer David Koby from the Newton Sheriff's Department arrived at the accident scene and he asked Plakas if he was willing to take a test for intoxication and Plakas agreed. (Doc. No. 21, Koby, p.3). Plakas objected to being transported with handcuffs behind him indicating that it would hurt his chest. (Doc. 21, Koby p. 4). Koby thought that he would have problems with Plakas if he uncuffed him. (Doc. No. 21., p. 4).

Koby placed Plakas in the squad car and while the vehicle was moving he heard a noise indicating that Plakas had managed to open the back door. (Doc. 21, Koby p.6). Koby attempted to stop his vehicle and when he hit the brakes he heard Plakas hit the screen between the front and rear seats. (Doc. 21, Koby p.6). The rear door flew open and Plakas bailed out running still handcuffed. (Doc. 21, Koby p. 6).

After Plakas escaped, Newton County called for assistance and Lucien Mark Perras with the Indiana State Police responded (Perras Dep. p. 3). Respondent, Jeff Drinski, a patrol officer for Newton County Sheriff's Department also responded. After escaping, Plakas ran to

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Indiana State Police Investigator William Krueger shortly after the incident. The statements and affidavits are attached to defendants' statement of uncontested facts, Doc. No. 21.

the home of Roy and Joyce Ailes. (Roy Ailes Dep. p. 5). Mrs. Ailes was home and heard a loud bang against the side of the house. (Joyce Ailes Dep. p. 21). She saw Plakas open the door and he fell in face first with the handcuffs still in place behind his back. (Joyce Ailes Dep. p. 23). He did not use his arms or his legs to block the fall and she did not know if he hit his head when he fell. (Joyce Ailes Dep. p. 24). Plakas told her that he wrecked his car and complained of his head bothering him. (Joyce Ailes Dep. p. 25).

Roy Ailes drove down to the scene of the accident and located firefighter Glen Cain and Officers Drinski and Koby who returned to his home with him. (Cain Dep. p. 20). Cain observed Plakas succeed in getting his legs through the handcuffs and in front of him as Cain entered the Ailes' home. (Cain Dep. p. 21). Plakas was combative when Cain entered the house. (Cain Dep. p. 25).

When Officer Koby entered the room Plakas was screaming at the top of his lungs and wanted to know why he had to be cuffed from the back. (Doc. No. 21 p. 9). Plakas yelled at Officer Koby because he had put him in handcuffs behind the back and it was pulling at scar tissue. (Joyce Ailes Dep. p. 97-98). Plakas never said that Officer Koby had struck him. (Joyce Ailes Dep. p. 99, Roy Ailes Dep. p. 61).

Plakas backed into a corner, grabbed the fireplace poker and got crazy. (Cain Dep. p. 25). He grabbed it with both hands and swung it like a baseball bat or chopping ax. (Cain Dep. p. 26). Officer Koby was trying to calm him down. (Joyce Ailes Dep. p. 51). Plakas attacked Officer

Koby with the fireplace poker who put his arm up over his head to protect his head. (Joyce Ailes Dep. p. 57-58).

After attacking Officer Koby, Plakas chased Glen Cain with the poker. (Cain Dep. p. 29). Cain thought that Plakas was going to kill him. (Cain Dep. p. 29). There were holes in the wall where Plakas swung at Cain. (Cain Dep. p. 29). After Plakas slammed the poker into the wall twice, he beat his head into the corner of the kitchen wall. (Joyce Ailes Dep. p. 64).

Jeff Drinski was at the rear of the house at the time of the attacks inside but heard that an officer had been struck. (Drinski Dep. p. 47). He went to Officer Koby who appeared to be in pain and Koby indicated that he had been struck by a fireplace poker. (Drinski Dep. p. 49).

Thereafter, Drinski and Perras entered the house through the garage and proceeded into the living room. They observed Plakas holding a steel fireplace poker, baseball bat style. (Drinski Dep. p. 51). Plakas again eluded the police and went back into the woods behind the Ailes' home. (Perras Dep. p. 33). With guns drawn, Sergeant King of the Newton County Sheriff's Department, State Trooper Perras and Drinski followed Plakas into the woods. (Drinski Dep. p. 55-56). Sergeant King stayed on the outside of a small opening or clearing in the middle of a thicket while Drinski and Perras followed behind Plakas. (Doc. 21 King p. 9).

Drinski did most of the talking, telling Plakas that there were people who cared about him and telling Plakas that he could walk away from this and nobody needs to get hurt. (Doc. No. 21 King, p. 9).

At one point, Plakas held up the weapon, pointed it at Drinski and said, "Either you're going to die here," pointed at Perras and said, "You're going to die here, or I'm going to die here." (Drinski Dep. p. 74). Moments later Plakas was trying to break through the hedge row to get away and he unexpectedly turned, faced Drinski and charged him. (Drinski Dep. p. 75). Plakas had the weapon in a raised position. (Drinski Dep. p. 75). Before Plakas charged him, Plakas was about twelve to fifteen feet from Drinski. (Drinski Dep. p. 77). As Plakas rushed closer to Drinski, Drinski tried to back up but backed up into something and fired one shot. (Drinski Dep. p. 79-80). Drinski backed up into a small tree but he did not know how tall it was. (Drinski Dep. p. 80). Plakas was within two arm lengths of Drinski and had closed half the distance that had been between them when Drinski fired his weapon. (Drinski Dep. p. 86). Drinski was in fear for his life when he fired the shot. (Drinski Dep. p. 90-91). Drinski was scared that night because he was in the dark woods and trying to bring into custody a person who was acting irrational. Plakas had already demonstrated his ability and his intention to inflict serious bodily injury or possibly death on another uniformed officer and Plakas was trying to do the same thing to Drinski when the shot was fired. (Drinski Dep. p. 96).

Trooper Perras was standing five to seven feet from Jeff Drinski at the time of the attack. (Perras Dep. p. 45). After Plakas said he was going to have to kill them, he raised the poker like a baseball bat and lunged toward Drinski. (Perras Dep. p. 45), Drinski took a step back and nearly fell down and the shot fired. (Perras Dep. p. 45). Plakas started a running take off at Drinski. (Perras Dep.

p. 45). When Plakas lunged at Jeff Drinski it was a sudden and unexpected action on his part. (Perras Dep. p. 111).

It was apparent to Perras that Plakas was going to take their lives. (Perras Dep. p. 105). If Drinski had not discharged his weapon, Perras was prepared to discharge his. (Perras Dep. 106). Based on his observation of the fireplace poker, it was definitely his belief that the poker had the ability to inflict serious bodily injury or death. (Perras Dep. p. 107).

Petitioner misstates the record when she asserts that the plaintiff produced evidence in the district court that Newton County Officer David Koby beat Plakas after Plakas was detained, patted down and handcuffed (Pet. p. 16), and when she states that Plakas was beaten and mistreated by officers of Newton County. (Pet. p. 21). The record in this case is devoid of any evidence that Officer Koby or any other officer beat the decedent.

Petitioner further asserts that Drinski was not adequately trained but failed to set forth his training contained in the record below. Jeff Drinski graduated from high school and went to Indiana University for two years obtaining thirty-three credit hours in Criminal Justice as his major. (Drinski Dep. p. 7-8). He attended the Indiana Law Enforcement Academy in October of 1989 to December of 1989. (Drinski Dep. p. 8). He was certified from the Law Enforcement Academy and also attended numerous seminars thereafter, some of which dealt with the subject of deadly force but not exclusively. (Drinski Dep. p. 10). He had classes at the Academy dealing with deadly force

and was trained through lecture, field exercise and interactive exercise. (Drinski Dep. p. 11). Newton County had training videotapes available for viewing and he watched numerous tapes that covered the subject of deadly force. (Drinski Dep. p. 16-20).

Additionally, petitioner's quotation from the Newton County Department Directive 1.3 dealing with the discharge of a firearm is incomplete. (Pet. p. 3-4). The entire directive addressing the discharge of fireams reads as follows:

III. Discharging Firearms

A. Employees may only discharge firearms in the performance of their regular duties or while acting under official color:

1. For supervised target practices and annual firearms qualifications.

2. When they reasonably believe the action to be in defense of human life:

3. To defend themselves from death or serious injury,

4. To defend another from death or serious injury.

5. To effect the arrest or prevent the escape of a convicted felon or person who has committed or attempted to commit a felony, when other means are insufficient and when they have absolute belief that a human life will be endangered if the escape is successful.

6. To kill a dangerous animal or one that is so badly injured that humanity requires its removal from further suffering, if it can be done safely (If owner is present, secure permission).

The Seventh Circuit and the District Court considered all the aforementioned facts and circumstances in addition to those set forth in the lower court's opinion and in doing so concluded that the use of deadly force was reasonable and comported with the guidelines established by this Court in *Tennessee v. Garner* and *Graham v. Connor*.

The petition has failed to supply this Court with any reason to undertake another review of the uncontroverted threat of imminent bodily harm or death present in this record.

II.

NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE ISSUES FRAMED BY THE PETITION.

A. THE LOWER COURT CONSIDERED THE TOTALITY OF THE CIRCUMSTANCES.

Petitioner urges that the shooting of Plakas was unreasonable under the totality of the circumstances and that the Seventh Circuit failed to consider the totality of the circumstances leading up to the use of deadly force in determining the constitutionality of the seizure. (Pet. p. 23).

Petitioner misconstrues the opinion of the Seventh Circuit by suggesting that it failed to consider facts and circumstances leading up to the use of deadly force. (Pet. p. 23). The opinion carefully and meticulously reviewed all of the facts and circumstances leading up to the attack on Drinski. (Pet., App. A-2-9).

Additionally, the opinion of the Court noted the importance of the factual details to its decision:

> "The details matter here, so we recite them." (Pet. App. A-2).

The opinion appealed from is clearly the product of the considered and careful judgment of the Court of Appeal's review of all of the facts and record in this case. The following excerpt from the opinion reflects a thorough consideration of all the facts and circumstances leading up to the attack on Drinski:

> "So we carve up the incident into segments and judge each on its own terms to see if the officer was reasonable at each stage. *Tom v. Voida* is a classic example of this analysis. Here it is beyond dispute that, under the Constitution, the police could reasonably (1) arrest Plakas for drunk driving after he exhibited familiar signs of intoxication; (2) track down an escaping arrestee; (3) draw and point weapons after Plakas armed himself and attacked an officer; (4) pursue Plakas into the clearing after he committed a violent offense and was a danger to himself; and (5) try to talk Plakas into disarming himself and surrendering. All of this means Drinski was properly standing in the clearing, gun in hand, several feet away from Plakas, who charged him with the poker raised. It is from

> that point on that we judge the reasonableness of the use of deadly force in light of all the officer knew." (Pet. App. A-14)

The aforementioned excerpt from the opinion appealed from clearly demonstrates that the petitioner is in error in suggesting to this Court that the lower court did not consider the totality of the circumstances leading up to the attack on Drinski. Moreover, the opinion specifically articulated that the Court was considering the whole event as it appeared to the officer involved. (Pet. App. p. A-13).

Plaintiff's assertion that the Seventh Circuit Court of Appeals failed to consider the circumstances before the attack on Drinski is unfounded. The decision below includes a fact specific analysis of all the events leading up to the attack on Drinski. A thorough review of the decision below reveals that the opinion does not support petitioner's contention that the Seventh Circuit failed to consider the totality of the circumstances.

B. ALTERNATIVE MEANS TO EFFECT AN ARREST ARE IRRELEVANT WHEN THE OFFICER REASONABLY USES DEADLY FORCE IN SELF DEFENSE.

The issue framed by petitioner – whether alternative means should be considered in effecting an arrest – is not a question legitimately raised by the opinion and record below. Petitioner overlooks critical evidence in her statement of facts and in her assertion that alternative means should have been used to effect the arrest. (Pet. p. 12). Jeff Drinski was in threat of imminent bodily harm or death

when he fired one shot. Petitioner does not assert otherwise nor does she contest this finding of the District Court or the Seventh Circuit Court of Appeals. Petitioner fails to take this critical fact into account when analyzing the opinion below.

Similarly, petitioner errs in her reliance upon *Klein v. Ryan*, 847 F.2d 368 (7th Cir. 1988) and *Brower v. County of Inyo*, 489 U.S. 593 (1989), appeal after remand, 884 F.2d 1316 (9th Cir.1989). Petitioner cites the aforementioned cases for the proposition that alternative lesser force options must be considered in effecting an arrest. (Pet. p. 13-14). Neither *Brower* nor *Klein* involved a case of self defense by an officer attacked with a deadly weapon.

The opinion below correctly reasoned as follows:

> "This is not a case where an officer claims to have used deadly force to prevent an escape. It is a self-defense case where the officer has "probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer" and, therefore, the officer may use deadly force. *Tennessee v. Garner* 471 U.S. 1, 3 (1985). See also *Graham v. Connor*, 490 U.S. 386, 396 (1989). Indeed, had Drinski been a private citizen, he would have been entitled to claim self-defense under Indiana law (which does not have a rule of retreat)." (Citations omitted). (Pet. App. A-7).

The opinion of the Seventh Circuit does not contravene any opinion of this Court and provides a consistent and well reasoned application of this Court's precedents in *Garner* and *Graham* as applied to the specific facts of this case.

Petitioner also mistakenly asserts that the opinion below is inconsistent with this Court's opinions in *Garner* and *Graham* in its focus on the moment immediately preceeding the shot. (Pet. p. 16). In *Graham*, this Court held reasonableness means the "standard of reasonableness at the moment," and "the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain and rapidly evolving about the amount of force that is necessary in a particular situation." *Graham* 490 U.S. 396. Jeff Drinski was forced to make a split-second judgment in self defense when Plakas charged at him with the weapon. Petitioner's suggestion that this Court should review nonlethal means to effect arrests presents a question not fairly raised by the opinion and record below.

C. THERE IS NO CONFLICT AMONGST THE CIRCUITS REGARDING THE USE OF DEADLY FORCE IN SELF DEFENSE

The contention that police officers created the justification for the use of deadly force is premised upon a misstatement of the evidence asserting that the plaintiff in the district court produced evidence that Officer Koby beat Plakas after Plakas was detained, patted down and handcuffed. This factual assertion is not supported by the record.

FIRST, petitioner waived any assertion of a claim of excessive force by Officer Koby or any other officer of Newton County Sheriff's Department having failed to raise such a claim in the District Court. The plaintiff's

amended complaint did not plead an unconstitutional use of force in the course of the original arrest or thereafter. The amended complaint was limited to a charge of an unconstitutional use of deadly force. Officer Koby was never a party defendant to this case. The Court below considered the possibility of waiver, noting:

> "Perhaps we ought not to consider this theory since it was not plead, but it is of no use to Plakas in any event." (Pet. App. p. A-9).

Having failed to raise this issue in the District Court, the petitioner has waived the opportunity for further review. SECOND, there is no evidence to support petitioner's assertion that Officer Koby beat Plakas. Petitioner asserts that at the time Plakas was taken into custody he was examined by medical personnel who determined he had no injuries to his head and that when he arrived at the Ailes' house after escaping from the locked squad car he had bruises on his head. Petitioner also relies upon Plakas' statement to Officer Koby at the Ailes' home "you hurt me." (Pet. p. 21). Based upon the aforementioned evidence petitioner asserts that Plakas was the victim of police brutality at the hands of Officer Koby. Petitioner fails to mention that the medical personnel wanted to take Plakas to an ambulance so that they could check him over and that he refused treatment after the car accident. (King Dep. p. 8, 12). Additionally, after Koby realized Plakas had opened the squad car door, he hit his brakes and he heard the plaintiff hit the screen between the seats. (Doc. No. 21, Koby p. 6). When Plakas arrived at the Ailes' home, he fell through the open door and did not block the fall with his arms or hands. (Joyce Ailes Dep. p. 23-24). He told Joyce Ailes he wrecked his

car and complained of his head bothering him. (Joyce Ailes Dep. p. 45).

Petitioner cites only a portion of Joyce Ailes' testimony with respect to Plakas yelling at Koby "you hurt me." She testified that Plakas was screaming at Koby because he put him in handcuffs behind the back and it was pulling at his scar tissue. (Joyce Ailes Dep. p. 98). Plakas never complained or reported to anyone at the Ailes' home that any police officer had beaten him or mistreated him. He complained only about the handcuffs. (Joyce Ailes Dep. p. 99, King Dep. p. 56, Ray Ailes Dep. p. 61).

Therefore, there is no evidence to support the plaintiff's assertion that Plakas was the victim of police brutality. THIRD, the lower court did not "avoid the issue" that Plakas was beaten by Newton County Officer Koby as suggested in the petition. (Pet. p. 18) . The Seventh Circuit considered the petitioner's theory and rejected it.

> "Perhaps in recognition of this weakness in the case, Plakas offers two other theories, one of which is a minor theme in his brief that shooting in self defense is in unjustified where the agressor acted out of reasonable fear of police brutality. See *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1501 (11th Circuit 1985) (en banc). Perhaps we ought not to consider this theory since it was not plead, but it is of no use to Plakas in any event.
>
> This theory is founded on the fact that Plakas told Koby, "you hurt me," and on Joyce Ailes' observation that Plakas had facial injuries. From this, Plakas argues a jury could infer that Officer

> Koby had beaten Plakas. This inference, however, cannot reasonably be made. Leaving aside the absence of evidence of facial injuries from medical records or post mortem observation, we accept that Ms. Ailes saw these injuries. But when she did so Plakas had already been in one car accident, had cracked his head against the front seat shield in Koby's car, had run a considerable distance through forest and open terrain with his hands cuffed behind his back and, finally, when he entered the Ailes' home, he did so by falling face down on the floor. Moreover, when Plakas did say anything at all about Koby, it was a complaint about cuffing him behind his back, which he said (without medical corroboration even now) caused pain because of scar tissue. Plakas yelled alot at Koby. It is significant he never yelled about a beating." (Pet. App., A 9-10).

FOURTH, there is no conflict between the lower court opinion and the opinion of *Gilmere v. City of Atlanta*, 774 F.2d 1495 (11th Circuit 1985) as asserted in the petition. (Pet. p. 23).

Gilmere is significantly distinguishable from the instant case. In *Gilmere*, unlike the present case, the officer using deadly force had unjustifiably beat the suspect before shooting him. 774 F.2d 1501, 1502. In *Gilmere*, unlike the instant case, the police had little cause to believe the suspect to be dangerous as he did not have a weapon.

In contrast, in the instant case, respondent Drinski has not been accused of any unjustified beating of Plakas and was not present when Officer Koby took Plakas into

custody. Contrary to the petition's contention, the opinion below is not in conflict with *Gilmere*. Concluding that Drinski did not cause Plakas to attack him, the lower court specifically noted that it was distinguishing *Gilmere*, but by doing so neither approved nor disapproved of its holding. (Pet. App. p. A-10 f.n. 4). It is readily apparent that the opinion of the Seventh Circuit in this case in no way conflicts with the opinion of the Eleventh Circuit in *Gilmere*.

For all the foregoing reasons the decision and record below do not raise the issue as framed in the petition.

III.

THERE IS NO CONSTITUTIONAL REQUIREMENT FOR A POLICE DEPARTMENT TO SUPPLY PARTICULAR EQUIPMENT TO ITS OFFICERS.

Without the support of any precedent, petitioner invites this Court to create and impose a constitutional requirement on police departments mandating the equipment to be provided to its officers.

The Court below correctly declined the invitation, holding:

> "There is, however, not a single precedent which holds that a governmental unit has a constitutional duty to supply particular forms of equipment to police officers. And, in fact, the 5th Circuit has held that the Constitution "does not mandate that law enforcement agencies maintain equipment useful in all foreseeable situations." *Salas v. Carpenter*, 980 F.2d 299, 310 (5th Cir. 1992). Indeed, Plakas merely states this theory, he does not argue it. Nor does he show how

such a rule of liability could be applied with reasonable limits. We do not think it is wise policy to permit every jury in these cases to hear expert testimony that an arrestee would have been uninjured if only the police had been able to use disabling gas or a capture net or a taser (or even larger number of police officers) and then decide a municipality is liable because it failed to buy this equipment (or increase its police force). There can be reasonable debates whether the Constitution also enacts a code of criminal procedure, but we think it is clear that the constitution does not enact a police administrator's equipment list. We decline to use this case to impose constitutional requirements on the police." (Pet. App. p. A-15-16).

The petitioner has provided this Court with no reason to disturb the ruling of the Court below.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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